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IN THE

Supreme Court of the United States

RICHARD MATHIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. A STATUTE OF CONVICTION IS DIVISIBLE ONLY IF IT LISTS ALTERNATIVE ELEMENTS, NOT ALTERNATIVE MEANS 2

A. This Court's Decisions Establish That Only Alternative Elements Make A Statute Divisible 2

B. The Government's Position Would Revive The Constitutional And Practical Problems That Made The Categorical Approach Necessary 11

C. Distinguishing Between Elements And Means Does Not Create The Problems The Government Claims It Does 16

II. IOWA'S OVERBROAD BURGLARY STATUTE IS INDIVISIBLE, SO THE LOWER COURTS ERRED IN APPLYING THE MODIFIED CATEGORICAL APPROACH 21

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Page(s)

Almanza-Arenas v. *Lynch*, __ F.3d __, 2016 WL 766753 (9th Cir. Feb. 29, 2016)..... 18, 19

Chambers v. *United States*, 555 U.S. 122 (2009)..... 7

Chavez-Solis v. *Lynch*, 803 F.3d 1004 (9th Cir. 2015)..... 18

Cisneros-Perez v. *Gonzales*, 465 F.3d 386 (9th Cir. 2006)..... 20

Coronado v. *Holder*, 759 F.3d 977 (9th Cir. 2014)..... 19

Descamps v. *United States*, 133 S. Ct. 2276 (2013)..... *passim*

James v. *United States*, 550 U.S. 192 (2007)..... 7, 9, 11, 18

Johnson v. *United States*, 559 U.S. 133 (2010)..... 2, 7, 19

McCarthy v. *United States*, 394 U.S. 459 (1969)..... 3

Mellouli v. *Lynch*, 135 S. Ct. 1980 (2015)..... 7, 9

Missouri v. *Frye*, 132 S. Ct. 1399 (2012)..... 14

Moncrieffe v. *Holder*, 133 S. Ct. 1678 (2013)..... 7, 10, 15

North Carolina v. *Alford*, 400 U.S. 25 (1970)..... 3

Omargharib v. *Holder*, 775 F.3d 192 (4th Cir. 2014)..... 20

Padilla-Martinez v. *Holder*, 770 F.3d 825 (9th Cir. 2014)..... 19

People v. *Vigil*, __ P.3d __, 2015 WL 4042473 (Colo. Ct. App. 2015)..... 16

Rendon v. *Holder*, 782 F.3d 466 (9th Cir. 2015)..... 18, 19

TABLE OF AUTHORITIES—Continued

Page(s)

Richardson v. *United States*, 526 U.S. 813 (1999) 2, 5

Schad v. *Arizona*, 501 U.S. 624 (1991) 2, 3, 4

Shepard v. *United States*, 544 U.S. 13 (2005) 7, 11

State v. *Duncan*, 312 N.W.2d 519 (Iowa 1981) 16

State v. *Peterson*, 230 P.3d 588 (Wash. 2010) 17

State v. *Pipkin*, 316 P.3d 255 (Or. 2013) 16

State v. *Seymour*, 515 N.W.2d 874 (Wis. 1994) 17

Sykes v. *United States*, 564 U.S. 1 (2011) 8

Taylor v. *United States*, 495 U.S. 575 (1990) 7

Tobias de Mota v. *Lynch*, ___ F App'x ___, 2015 WL 8735900 (9th Cir. Dec. 15, 2015) 19

United States v. *Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) 9

United States v. *Castleman*, 134 S. Ct. 1405 (2014) 7, 17

United States v. *Damrah*, 412 F.3d 618 (6th Cir. 2005) 17

United States v. *De la Torre-Jimenez*, 771 F.3d 1163 (9th Cir. 2014) 20

United States v. *Espinoza-Morales*, 621 F.3d 1141 (9th Cir. 2010) 20

United States v. *Howard*, 742 F.3d 1334 (11th Cir. 2014) 18

United States v. *Huitron-Rocha*, 771 F.3d 1183 (9th Cir. 2014) 20

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Lee*, 317 F.3d 26 (1st Cir. 2003) 17

United States v. *Lockett*, 810 F.3d 1262 (11th Cir. 2016) 18

STATUTES AND RULES

18 U.S.C.

§ 924 ..... 4, 10

§ 1029 17

§ 1425 17

Cal. Health & Safety Code

§ 11351 20

§ 11352 20

§ 11375 19

§ 11377 19

§ 11378 19

Cal. Penal Code § 459 10

Miss. Code Ann. § 97-17-23 21

Okla. Stat. Ann. tit. 21, § 1431 21

Vt. Stat. Ann. tit. 13, § 1201 17

Wash. Rev. Code Ann. § 9A.52.025 21

Fed. R. Crim. P. 7 4

OTHER AUTHORITIES

23A C.J.S. *Criminal Law* (2016) 16

42 C.J.S. *Indictments* (2016) 16

4 Iowa Practice Series, *Criminal Law* (2015) 16

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INTRODUCTION

This Court has held that a criminal statute is "divisible" for ACCA purposes, and thus susceptible to the modified categorical approach, only if it "sets out one or more *elements of the offense* in the alternative." *Descamps* v. *United States*, 133 S. Ct. 2276, 2281 (2013) (emphasis added). The government nonetheless argues (at 7) that any criminal statute that contains the word "or" is subject to the modified categorical approach, even if the disjunctive list merely illustrates different means of committing a single offense. The government coins its own phrase for such a statute—"textually divisible," a term this Court has never used. Br. 2, 6, 7, 11, 15, 16. The government's resort to neologism only confirms that the Court has never applied the modified categorical approach as the government wishes, and it should not start now.

I. A Statute Of Conviction Is Divisible Only If It Lists Alternative Elements, Not Alternative Means

A. This Court's Decisions Establish That Only Alternative Elements Make A Statute Divisible

1. This Court could not have rejected the government's position more clearly: "a divisible statute[] list[s] potential offense *elements* in the alternative." *Descamps*, 133 S. Ct. at 2283 (emphasis added); *see also, e.g., id.* at 2281 ("an 'indivisible' statute—*i.e.*, one not containing alternative *elements*" (emphasis added)); *id.* (a "divisible statute ... sets out one or more *elements of the offense* in the alternative" (emphasis added)). The Court similarly stated in *Johnson* v. *United States* that a statute is divisible when "the elements of the offense are disjunctive." 559 U.S. 133, 136 (2010). (The government's reliance on *Johnson* depends on misleadingly quoting only the word "disjunctive" while omitting the preceding words "the elements of the offense are." Br. 24.)

In criminal law, an offense "element" refers to an allegation that a jury must find beyond a reasonable doubt (or a defendant must admit) in order to permit a conviction for that offense. A "jury ... cannot convict unless it unanimously finds that the Government has proved each element." *Richardson* v. *United States*, 526 U.S. 813, 817 (1999); *see also* Pet. Br. 18-21. Elements differ from the "means" of commission, which are the "possible sets of underlying brute facts [that] make up a particular element." *Richardson*, 526 U.S. at 817. Jurors are *not* "required to agree upon a single means of commission," *Schad* v. *Arizona*, 501 U.S. 624, 631-632 (1991) (plurality opinion)—even where possible means are stated explicitly in the statute, as they were in the

Arizona law at issue in *Schad*, *id.* at 628 n.1. Likewise, a guilty plea "is an admission of all the elements of a formal criminal charge," not of the particular means stated in the charging instrument or plea. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969); *see also, e.g.*, *North Carolina* v. *Alford*, 400 U.S. 25, 37 (1970) (defendant may plead guilty without "admit[ting] his participation in the acts constituting the crime").

The government denies none of this, but insists that this Court's repeated reference to "elements" in *Descamps* deviated from the term's established meaning and included means of commission as well. The government's argument is unpersuasive. The Court distinguished between elements and means, citing *Richardson* and emphasizing that "the only facts the court can be sure the jury ... found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Descamps*, 133 S. Ct. at 2288 (citing 526 U.S. at 817). Justice Alito recognized as much in dissent. *Id.* at 2296 ("By an element, I understand the Court to mean something on which a jury must agree by the vote required to convict under the law of the applicable jurisdiction."); *see also id.* at 2298 (citing *Schad* and *Richardson*). In reply, the Court did not say that Justice Alito had misunderstood the difference between elements and means or that, as the government argues (at 23), the difference did not matter for divisibility purposes. On the contrary, the Court stuck to the traditional usage of those terms, and explained that its prior decisions were consistent with, and depended upon, the distinction between elements and means: "All those decisions rested on the explicit premise that the laws contained statutory phrases that cover several different ... crimes"—which is possible only if the alternatives are genuine elements, "not sev-

eral different methods of committing one offense." 133 S. Ct. at 2284-2285 & n.2 (brackets and internal quotation marks omitted); *see also id.* at 2285 n.2 (if "the state laws at issue in" *Taylor*, *Shepard*, and *Johnson* "set out 'merely alternative means, not alternative elements' of an offense," that "would have been news to the *Taylor*, *Shepard*, and *Johnson* Courts"). And the Court contemplated consulting *Shepard* documents to resolve doubts about whether the statutory alternatives were "elements or means" only because, the Court stated, those documents might help identify "the crime's *elements*." *Id.* (emphasis added).

Other passages in *Descamps* confirm that, when the Court wrote "elements," it meant elements. The Court stated that "when a statute lists multiple, alternative elements, [it] effectively creates 'several different ... crimes.'" *Id.* at 2285; *see also id.* at 2285 n.2 (same). A list of alternative means does not create several crimes. *Id.* at 2285 n.2. The Court also wrote that a "prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives," *id.* at 2290; by contrast, a prosecutor may include several alternative means in a single count, even if the several means are expressly listed in the statute. Pet. Br. 18-20; *Schad*, 501 U.S. at 631 ("an indictment need not specify which overt act, among several named, was the means by which a crime was committed"); Fed. R. Crim. P 7(c)(1) (a single count of an indictment may allege the means of commission in the alternative).

Descamps drew the importance of elements not from thin air, but from the text and history of ACCA itself. By making a sentence enhancement turn on "convictions," 18 U.S.C. § 924(e)(1), not conduct, ACCA reflects a "deliberate decision to treat every conviction

of a crime in the same manner," meaning that "*a prior crime* would qualify as a predicate offense in all cases or in none." *Descamps*, 133 S. Ct. at 2287 (emphasis added). Congress's decision is effectuated by ensuring that a statute setting forth only one crime defined by one set of "elements of the offense" is evaluated categorically against the generic offense, and its status as an ACCA predicate does not vary depending on what assertions happen to be in the *Shepard* documents.

2. The government does not explain why the Court in *Descamps* would have been confused about or indifferent to the clear distinction between elements and means that the Court has otherwise been so careful to maintain. Nor does the government explain how its reading of the Court's repeated references to "elements" can be reconciled with the unique role the elements of an offense play in charging and proving a crime. References to the offense's "statutory definition" do not help the government (*e.g.*, Br. 7, 9, 19, 20); after all, a crime is defined by its elements, not by additional words in a statute that a jury need not consider in order to convict. "[C]rimes are made up of factual elements," *Richardson*, 526 U.S. at 817; anything else describes "amplifying but legally extraneous circumstances," *Descamps*, 133 S. Ct. at 2288.

The government argues, without citation, that explicit "[s]tatutory alternatives matter because they set out what the jury is required to find." Br. 29-30. The lack of cited authority is unsurprising; as discussed, a jury is only "required to find" elements, not means. *E.g.*, *Descamps*, 133 S. Ct. at 2288 ("the only facts the court can be sure the jury ... found are those constituting elements of the offense"). The government "nowhere explains how a factfinder can have 'necessarily

found' a non-element," whether that non-element is expressly listed in the statute or not. *Id.* at 2286 n.3.

The government invokes (at 29-30) the Court's hypothetical discussion in *Descamps* of a law "criminaliz[ing] assault with any of eight specified weapons," 133 S. Ct. at 2290, under which a jury would be required to find a specific alternative weapon. But the Court's discussion shows that the weapons listed in the hypothetical statute were elements, not means of commission. Not only did the Court expressly refer to each specific weapon as an alternative "element," *see* 133 S. Ct. at 2290 (the prosecutor "must generally select the relevant *element* from its list of alternatives" (emphasis added)), but it also expressly stated that "the jury ... must then find that element[] unanimously," *id.*, which is not true of means of commission.[1]

3. The government argues (at 25) that, if divisibility depended on whether alternative phrases were elements or means, the Court would have said so before *Descamps*. That argument is indistinguishable from one position advanced in the *Descamps* dissent and rejected by the Court. The "explicit premise" of *Taylor*, *Shepard*, and *Johnson*, the Court ruled, was that the laws at issue "contained statutory phrases that cover several different ... crimes, not several different methods of committing one offense." *Descamps*, 133 S. Ct. at 2285 n.2 (alterations and internal quotation marks omitted).

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[1] The Court's example of a hypothetical statute that prohibits burglary of a building or an automobile (Resp. Br. 32) does not help the government either, because the Court defined the building and the automobile as "elements of the offense in the alternative." *Descamps*, 133 S. Ct. at 2281.

And in any event, the government's dog-that-didn't-bark theory is flawed: in prior cases, either the parties did not dispute divisibility, or there was no need for the Court to inquire into it (that need exists only when the statute of conviction is broader than the generic offense *and* the proffered *Shepard* documents indicate that the factual basis of the conviction conforms to the generic offense). In *Taylor* v. *United States*, it was unclear what Missouri statute was even at issue. 495 U.S. 575, 602 (1990). In *Shepard* v. *United States*, the Court assumed that the modified categorical approach applied, and decided only what documents could be considered under that approach. 544 U.S. 13, 16 (2005). In *Johnson*, the Court held that the assumed basis of the conviction did not conform to the generic offense. 559 U.S. at 137-143; *see also Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1687 (2013) (same); *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1984, 1986 n.4 (2015) (same, and the government did "not argue[] that this case falls within the compass of the modified-categorical approach"); *Chambers* v. *United States*, 555 U.S. 122, 126, 127-128 (2009) (parties agreed on statute's divisibility, and basis of conviction did not conform to generic offense). In *James* v. *United States*, the parties did not dispute that the second-degree burglary statute was divisible between "dwelling" and occupied "structure or conveyance," and the Court did not need to decide whether "dwelling" itself was divisible because it found that it was not overbroad. 550 U.S. 192, 212-213 & n.7 (2007) (holding that "curtilage," an aspect of the statute's definition of "dwelling," was within the generic residual-clause offense), *overruled by Johnson* v. *United States*, 135 S. Ct. 2551, 2563 (2015); *see also United States* v. *Castleman*, 134 S. Ct. 1405, 1414 (2014) ("parties do not contest that [the statute] is a 'divisible

statute'"); *Sykes* v. *United States*, 564 U.S. 1, 5-6, 13-15 (2011) (no apparent dispute about divisibility); *id.* at 17 (Thomas, J., concurring in the judgment) (referring to the "elements of" the statute).

4. The government also contends that "where the defendant is charged on only one theory[]" (Br. 18), "the factfinder 'necessarily' had to find that alternative to convict" (Br. 27). The government's "theory of the case" approach is indistinguishable from the approach applied by the Ninth Circuit in *Descamps* and definitively rejected by this Court.

Notably, the government's "theory of the case" argument does not turn on whether the charged "theory" is explicit or implicit in the statute, and thus would have yielded the opposite outcome in *Descamps* were it correct. The *Shepard* documents relating to Mr. Descamps's prior conviction (an information and plea colloquy) contained government assertions that he had committed burglary by unlawfully entering a building to commit a felony therein—conduct that would have met the generic definition of burglary. *Descamps*, 133 S. Ct. at 2282 ("At the plea hearing, the prosecutor proffered that the crime 'involve[d] the breaking and entering of a grocery store,' and Descamps failed to object to that statement."); JA14a-15a, *Descamps*, 2012 WL 7746771 (2012) (information alleging that the defendant "wilfully, unlawfully and feloniously enter[ed] a building"). The Ninth Circuit determined that Mr. Descamps's prior conviction conformed to the generic offense based on its decision in *United States* v. *Aguila-Montes de Oca*, where it had explained that if the statute requires "the use of a gun or an axe," and "if the indictment alleges only that the defendant used a gun, and the only prosecutorial theory of the case (as ascertained exclusively through the relevant *Shepard* docu-

ments) is that the defendant used a gun," "then we can be confident that if the jury convicted the defendant, the jury found that the defendant used a gun rather than an axe." 655 F.3d 915, 936 (9th Cir. 2011) (en banc); *see also id.* at 936-937 ("[I]n the plea context, if the only weapon the defendant admitted to using was a gun, then we can be confident that the trier of fact was 'required' to find that the defendant used a gun in the course of assaulting the victim."). The Ninth Circuit, like the government here, believed that the modified categorical approach could be used because it "asks what facts the conviction 'necessarily rested' on in light of *the theory of the case* as revealed in the relevant *Shepard* documents." *Id.* at 937 (emphasis added).

This Court abrogated the Ninth Circuit's "theory of the case" approach, which "turns an elements-based inquiry into an evidence-based one" and asks "not whether 'statutory definitions' *necessarily* require an adjudicator to find the generic offense, but instead whether the prosecutor's case realistically led the adjudicator to make that determination." *Descamps*, 133 S. Ct. at 2287 (emphasis added); *see also id.* at 2286 n.3. This Court held that *Shepard* documents may not be considered to determine "what the defendant and state judge must have understood as the factual basis of the prior plea, or what the jury in a prior trial must have accepted as the theory of the crime." *Id.* at 2288. The categorical approach (and its modified variant) "focus[] on the *legal* question of what a conviction necessarily establishe[s]" in *all* cases of conviction for the same crime; it does not permit a *factual* determination of the theory that the prosecution asserted in a particular case. *Mellouli*, 135 S. Ct. at 1987 (emphasis altered); *see Descamps*, 133 S. Ct. at 2281, 2293; *James*, 550 U.S. at 214 ("In determining whether attempted burglary under Florida law

qualifies as a violent felony under § 924(e)(2)(B)(ii), the Court is engaging in statutory interpretation, not judicial factfinding."); *Moncrieffe*, 133 S. Ct. at 1688-1689 (court considers offense of conviction "in the abstract, not the actual ... offense being prosecuted").

Thus, it made no difference "[w]hether Descamps *did* break and enter," *Descamps*, 133 S. Ct. at 2286, "whether he ever admitted to breaking and entering," *id.*, or whether the prosecution *said* without objection that he broke and entered, *id.* at 2282. Rather, what mattered was that *the California burglary statute*, Cal. Penal Code § 459—"the crime of which he was convicted—d[id] not require the factfinder (whether jury or judge) to make that determination." *Id.* at 2293. The prosecution cannot change what the *statute requires* simply by asserting a particular means of commission as its theory of the case. When a jury convicts after being presented with a single theory of the case, or when a defendant pleads guilty to an indictment alleging a single theory of the crime, the *Shepard* documents "[a]t most" demonstrate that the defendant "committed" the generic crime, "and so hypothetically *could have been* convicted under a law criminalizing that conduct." *Id.* at 2287-2288. "But that is just what [this Court] said, in *Taylor* and elsewhere, is not enough" for the conviction to qualify under ACCA. *Id.* at 2288.

If, as the government believes, correspondence between the defendant's conviction and generic burglary could be established by *Shepard* documents where the state statute defines a single offense that can be committed by multiple means, then Mr. Descamps would have lost in this Court. It makes no difference that California's burglary statute covers nongeneric means of commission through *silence* (*Descamps*), whereas Iowa's statute does so through an express provision (this

case). In both situations, a conviction can be obtained without the prosecution charging, the defendant admitting, or a jury finding an element of generic burglary; and in both cases, *Shepard* documents mentioned extraneous facts corresponding to generic burglary.

The government has shown no principled reason to treat this case any differently from *Descamps*. The Court should reject the government's unfounded, artificial distinction between the two cases and reaffirm that a statute is divisible only when it contains alternative elements and thus defines different crimes, not when it sets out possible alternative means of committing a single crime.

B. The Government's Position Would Revive The Constitutional And Practical Problems That Made The Categorical Approach Necessary

1. As *Descamps* noted, one reason for the Court's "insistence on the categorical approach" is to avoid the "serious Sixth Amendment concerns" that would arise if the sentencing court's finding of an ACCA predicate offense "went beyond merely identifying a prior conviction." 133 S. Ct. at 2288; *see also Shepard*, 544 U.S. at 25 (plurality opinion); *id.* at 28 (Thomas, J., concurring in part and concurring in judgment). The categorical approach—including its modified form—prevents a sentencing court from determining "what the defendant and state judge must have understood as the factual basis of the prior plea, or what the jury in a prior trial must have accepted as the theory of the crime." *Descamps*, 133 S. Ct. at 2288 (internal quotation marks omitted). Instead, they permit the sentencing court to perform the purely *legal* inquiry into the *elements* of the crime of conviction and compare them to the generic offense. *James*, 550 U.S. at 214 ("[B]y applying *Tay-*

lor's categorical approach, we have avoided any inquiry into the underlying facts of James' particular offense, and have looked solely to the elements of attempted burglary as defined by Florida law. Such analysis raises no Sixth Amendment issue."). As Mr. Mathis showed (Br. 26-27), the same constitutional concerns require limiting the modified categorical approach to statutes setting out alternative elements, not means.

The government responds (at 31-32) that these concerns are avoided as long as only "conclusive" record documents are considered, by which the government evidently means those showing that "the prosecutor charged only one means and the defendant was found guilty of that charge," for then "the factfinder necessarily had to find that each element was established beyond a reasonable doubt."

Once again, the government's argument (were it valid) would have changed the result in *Descamps*, where the prosecution charged only one means (unlawful entry). In fact, the government's argument is yet another rehash of the Ninth Circuit's rejected "theory of the case" approach, which "flout[ed]" the Court's Sixth Amendment reasoning "by extending judicial factfinding beyond the recognition of a prior conviction." 133 S. Ct. at 2288. As the Court observed, "the only facts the court can be sure the jury ... found are those constituting elements of the offense." *Id.* Therefore, "[w]hatever the underlying facts or the evidence presented"—whatever the prosecution's theory of the case—it is only as to *elements* that the defendant is "convicted, in the deliberate and considered way the Constitution guarantees." *Id.* at 2290. An approach in which the sentencing court relies "on its own finding about a non-elemental fact to increase a defendant's maximum sentence" under ACCA—the Ninth Circuit's

approach in *Descamps* as much as the government's here—cannot be squared with the Sixth Amendment. *Id.* at 2288-2289.

The government does not explain why the presence of statutorily explicit alternatives in Iowa's burglary statute should make a constitutional difference. Rather, unless the alternatives are elements of the crime, a sentencing court's inferences regarding means of commission produce the same constitutionally impermissible factfinding rejected in *Descamps*.

2. The government's approach also revives the inequities that this Court properly avoided. This Court recognized that "[t]he meaning of [*Shepard*] documents will often be uncertain," and their "statements of fact ... may be downright wrong." *Descamps*, 133 S. Ct. at 2289. Defendants "often ha[ve] little incentive" to ensure the factual accuracy of such documents as to "facts that are not elements of the charged offense—and may have good reason not to," including inadvertently admitting guilt and irritating the judge with disputes that have no bearing on the adjudication of the charge. *Id.* For example, an Iowa defendant charged with burglarizing a garage would be unlikely to argue that he actually burglarized a car parked outside the garage. *See also* AILA Br. 28-29 (listing examples of irrelevant means). Moreover, as Mr. Mathis explained (Br. 28-29), Iowa charging documents—the only relevant *Shepard* documents in this case—are prone to error for reasons that are not unique to Iowa. The government does not even respond to these concerns, much less explain how a sentencing court could tell whether charging documents accurately stated a means of commission.

The government's approach would also result in defendants convicted of the same crime being treated dif-

ferently depending on what the *Shepard* documents in their cases happen to say about the means of commission. That is at odds with Congress's intent that "ACCA ... function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none." *Descamps*, 133 S. Ct. at 2287.

The government separately has precious little to say about the plea context, notwithstanding that "ninety-four percent of state convictions are the result of guilty pleas." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012). This Court recognized in *Descamps* that the government's factual approach would "deprive some defendants of the benefits of their negotiated plea deals" because it would treat convictions as ACCA predicates even where the defendant "plead[ed] guilty to a less serious crime, whose *elements* do not match an ACCA offense." 133 S. Ct. at 2289 (emphasis added). As Mr. Mathis demonstrated (Br. 29-30), the government's approach in this case creates the same problem.

The government contends (at 33) that there would be no unfairness as long as the *Shepard* documents reveal that the "prior offense *does* match" the generic offense because then "the defendant 'knew which statutory phrase formed the basis for the conviction.'" But that would have been true in *Descamps* too, where the charging document and plea colloquy referred only to facts within the generic offense. This case illustrates the same concern, in that the only record documents relied upon are charging documents, which do not reveal what (if any) facts Mr. Mathis actually admitted.[2]

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[2] The government misses the point in suggesting (at 46 n.15) that Mr. Mathis "forfeited" any argument that the *Shepard* documents in this case "were inadequate to establish his convictions for the charged crimes." Although the *Shepard* documents in this case

3. Mr. Mathis noted (Br. 30-31) that the government's approach would create irrational disparities across States that criminalize exactly the same conduct. The government (at 34) tries to dodge the point by misconstruing it as raising the question whether "a sentencing court should review judicial rulings." The point is that, under the government's approach, the statute of conviction in hypothetical State A will be divisible, while the one in State B will not, solely because the alternative means were legislatively codified in State A but developed judicially in State B. The result is that two defendants, convicted of substantively identical crimes under substantively identical criminal laws, will be treated differently under ACCA based solely on the *form* of the statute of conviction, not its actual reach. The government has no response.

The government also argues (at 34) that "basing the ACCA's applicability on a state-law distinction between 'means' and 'elements'" would create interstate disparities. But *that* kind of disparity comes naturally from the fact that, where one State's law lists alternative elements and another lists alternative means, the States have created *different crimes*. *Descamps*, 133 S. Ct. at 2285 & n.2. Any disparity in ACCA's application to different crimes "is the longstanding, natural result of the categorical approach, which focuses not on the criminal conduct a defendant 'commit[s],' but rather [on] what facts are necessarily established by a conviction for the state offense." *Moncrieffe*, 133 S. Ct. at 1693 n.11. Moreover, as Mr. Mathis noted (Br. 31 n.12),

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are indeed inadequate to that task, Mr. Mathis pointed to them to illustrate the danger in using *Shepard* documents (especially charging documents alone) to determine whether a defendant admitted a particular means of commission, because such documents often do not reflect an ultimate plea's factual basis. Pet. Br. 28-29.

allowing for this disparity respects the States' decisions about how to define crimes. States are of course free, though not obligated, to amend their laws to clarify whether any alternatives are elements or means and thus to determine how they are treated for ACCA purposes. And if Congress is dissatisfied with ACCA's reach, it is free to alter it. *See Descamps*, 133 S. Ct. at 2293-2294 (Kennedy, J., concurring).[3]

C. Distinguishing Between Elements And Means Does Not Create The Problems The Government Claims It Does

1. The government says (at 43 n.13) that the "task" of determining whether statutory alternatives are elements or means "is not an easy one"—even as it concedes that *State* v. *Duncan*, 312 N.W.2d 519 (Iowa 1981), resolves the question in this case.[4] And Iowa is not unique in this regard; many States' courts have specifically decided whether a criminal statute sets out elements or means. *E.g.*, *People* v. *Vigil*, __ P.3d __, 2015 WL 4042473, at *5, 7 (Colo. Ct. App. 2015) (holding that jury need not agree on whether defendant burglarized trailer, tractor, shop, or lean-to because specific place was a means, not an element); *State* v. *Pipkin*, 316

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[3] Because ACCA is a federal sentencing law reflecting federal criminal policy, its reach (whatever it may be) places no burden on the States to modify their laws in any particular way. The States' policy interests are fully addressed by the criminalization and sentencing that their own laws provide. Indeed, States may prefer to increase the likelihood of conviction by relieving juries of the obligation to agree on certain facts, even at the cost of disqualifying the offense as an ACCA predicate.

[4] Identifying *Duncan* was a matter of reviewing relevant criminal law treatises. *See* 4 Iowa Practice Series, *Criminal Law* § 10:4 n.9 (2015); 23A C.J.S. *Criminal Law* § 1882 nn.3, 6 (2016); 42 C.J.S. *Indictments* § 206 n.4 (2016).

P.3d 255, 260 (Or. 2013) (holding that "entering and remaining unlawfully" in burglary statute are means, not "separate elements"); *State* v. *Peterson*, 230 P.3d 588, 591 (Wash. 2010) (holding that sex offender registration statute set out alternative means, not elements); *State* v. *Seymour*, 515 N.W.2d 874, 876 (Wis. 1994) (employee theft statute "describe[d] independent offenses rather than simply delineating methods by which the same offense may be committed"); *see also* AILA Br. 12-21 (collecting decisions from various jurisdictions).

Where state decisional law is unavailable, the sentencing court will interpret the statute of conviction for itself. But statutory interpretation is no unfamiliar task for federal courts. For example, this Court has analyzed state law in cases involving the categorical approach, including by examining state statutes and case law. *See, e.g.*, *Castleman*, 134 S. Ct. at 1413-1415. There is no reason to think the federal courts could not do the same with respect to the divisibility analysis. Indeed, federal courts already distinguish elements from means when assessing the sufficiency of an indictment or drafting a jury instruction. *See, e.g.*, *United States* v. *Damrah*, 412 F.3d 618, 622-623 (6th Cir. 2005) (deciding that 18 U.S.C. § 1425 sets out alternative means, not elements); *United States* v. *Lee*, 317 F.3d 26, 36 (1st Cir. 2003) (distinguishing elements of 18 U.S.C. § 1029(a)(3) from "brute facts that constitute those elements"). In some instances, the text of the criminal statute will make clear whether alternatives are means or elements. *See* AILA Br. 31 (listing examples). For example, where the statute provides different penalties for different alternatives, *Apprendi* dictates that the alternatives are elements. *See, e.g.*, Vt. Stat. Ann. tit. 13, § 1201. And where the list is non-exhaustive, it is likely that the alternatives are illustrative means rather

than elements. *United States* v. *Lockett*, 810 F.3d 1262, 1268 (11th Cir. 2016); *United States* v. *Howard*, 742 F.3d 1334, 1348-1349 (11th Cir. 2014).

Where state case law and statutory text are inconclusive, it may also be appropriate for federal courts to look to other sources, such as pattern jury instructions, model verdict forms, or commentaries. *See, e.g.*, *Almanza-Arenas* v. *Lynch*, __ F.3d __, 2016 WL 766753, at *8 (9th Cir. Feb. 29, 2016) (en banc) (consulting pattern jury instructions); *Chavez-Solis* v. *Lynch*, 803 F.3d 1004, 1013 (9th Cir. 2015) (same); *Lockett*, 810 F.3d at 1271 (same). *Shepard* documents may also be helpful for this task, at least where they confirm that the alternatives are means. *Descamps*, 133 S. Ct. at 2285 n.2; *see also* Pet. Br. 24 & n.9. If need be, the question can often be certified to the highest court of the relevant State.[5]

The government claims (at 38-41) that the experience of the Ninth and Fourth Circuits, which support Mr. Mathis's position, evidences that approach's "shortcomings." On the contrary, they demonstrate its workability.

The government's presentation of the Ninth Circuit's decisions is decidedly incomplete. It mentions Judge Graber's 2015 dissent from denial of rehearing en banc in *Rendon* v. *Holder*, 782 F.3d 466 (9th Cir. 2015), which addressed the proper approach for determining divisibility, but neglects to mention that the Ninth Circuit later *granted* rehearing en banc on the same issue and had no trouble reading *Descamps* as it should be

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[5] If none of these tools permits the sentencing court to distinguish elements from means, it should avoid any Sixth Amendment concern by assuming that the statute of conviction did not "necessarily require an adjudicator to find the generic offense," *i.e.*, by treating the alternatives as means. *Descamps*, 133 S. Ct at 2287.

read. *Almanza-Arenas*, 2016 WL 766753. The en banc court added that "[l]ooking to state law to determine a state's interpretation of its own statutes is nothing new," and noted that this Court had carefully examined state law in *Descamps* and *Johnson*, 559 U.S. 133. *Almanza-Arenas*, 2016 WL 766753, at *6. Nor did the court have any trouble applying this rule: looking to the statutory text, charging documents, and state law, it ruled that the relevant California criminal statute was indivisible because it set out alternative means. *Id.* at *1.[6]

The government fears (at 39-40) that judges on the Ninth Circuit would conclude that California drug statutes that list several controlled substances disjunctively "may not be divisible by drug type." Br. 39. The government's prophecy has not come to pass. The Ninth Circuit has repeatedly held that California drug laws are divisible because they require the jury to agree on the particular type of drug, *i.e.*, the drug type is an element. *See, e.g.*, *Coronado* v. *Holder*, 759 F.3d 977, 984-985 (9th Cir. 2014) (drug possession under Cal. Health & Safety Code § 11377(a)); *Padilla-Martinez* v. *Holder*, 770 F.3d 825, 831 n.3 (9th Cir. 2014) (possession for sale under Cal. Health & Safety Code § 11378); *Tobias de Mota* v. *Lynch*, __ F App'x __, 2015 WL 8735900, at *1 (9th Cir. Dec. 15, 2015) (possession for sale under Cal. Health & Safety Code § 11375(b)); *see*

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[6] The government also gets Judge Kozinski's separate opinion in *Rendon* wrong. Like Mr. Mathis, Judge Kozinski maintained that if "the statutory alternative was simply a means of committing the offense," the modified categorical approach would not apply. *Rendon*, 782 F.3d at 473 (Kozinski, J., dissenting from denial of rehearing en banc). Judge Kozinski also argued that "*Descamps* permits [the court] to peek at the *Shepard* documents in order to determine" whether the alternatives are elements or means. *Id.*

also United States v. *De la Torre-Jimenez*, 771 F.3d 1163, 1166 (9th Cir. 2014) (Graber, J.) (possession for sale under Cal. Health & Safety Code § 11351); *United States* v. *Huitron-Rocha*, 771 F.3d 1183, 1184 (9th Cir. 2014) (Graber, J.) (possession and transportation under Cal. Health & Safety Code § 11352(a)).

Similarly, the Fourth Circuit had no trouble applying the proper approach in *Omargharib* v. *Holder*, where, contrary to the government's suggestion (at 40), the court was unanimous that the alternatives in the Virginia larceny statute at issue were "means ..., not ... elements." 775 F.3d 192, 200 (4th Cir. 2014); *see also id.* at 200 (Niemeyer, J., concurring) ("I am pleased to concur in [the court's] well-crafted opinion[.]").

In any event, that judges may disagree over whether a statute's alternatives are elements or means does not vitiate the approach. Courts that apply the modified categorical approach routinely disagree about what the *Shepard* documents reveal in particular cases, but the government hardly finds that problematic. *Compare United States* v. *Espinoza-Morales*, 621 F.3d 1141, 1149 (9th Cir. 2010) (concluding that *Shepard* documents did not establish convictions to be crimes of violence), *with id.* at 1153-1154 (Walter, D.J., dissenting) (concluding the opposite); *compare Cisneros-Perez* v. *Gonzales*, 465 F.3d 386, 392-394 (9th Cir. 2006) (concluding *Shepard* documents did not establish predicate offense), *with id.* at 395-396 (Callahan, J., dissenting) (concluding the opposite); *see also* AILA Br. 28-29 (discussing effort needed to ascertain alleged facts from *Shepard* documents).

2. Finally, the government's claim (at 41-42) that Mr. Mathis's position undermines ACCA's purposes lacks merit. Some States have burglary crimes that

categorically match generic offenses and will remain ACCA predicates. *E.g.*, Miss. Code Ann. § 97-17-23 (breaking and entering "the dwelling house or inner door of such dwelling house of another"); Okla. Stat. Ann. tit. 21, § 1431 (breaking and entering "the dwelling house of another"); Wash. Rev. Code Ann. § 9A.52.025 (unlawful entry into or remaining in "a dwelling other than a vehicle"). Convictions under statutes setting out alternative elements will trigger the modified categorical approach and qualify as long as the conviction was for a crime conforming to the generic offense. And again, if Congress is dissatisfied with ACCA's interaction with state law, it may amend the relevant provisions (as may States, if they wish).

II. IOWA'S OVERBROAD BURGLARY STATUTE IS INDIVISIBLE, SO THE LOWER COURTS ERRED IN APPLYING THE MODIFIED CATEGORICAL APPROACH

The government agrees (at 44) that Iowa's definition of burglary "is broader than generic burglary" because it encompasses places besides a "'building'" or "'structure.'" The government also concedes (at 43 & n.13) that the Supreme Court of Iowa has "definitively resolv[ed]" that the different places listed in the burglary statute are means rather than elements. Together, those concessions resolve this case. The Iowa burglary law under which Mr. Mathis was convicted is indivisible, and the lower courts erred in using the modified categorical approach.[7]

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[7] The government is correct (Br. 5 n.1), and Mr. Mathis's opening brief (at 7 n.2) overlooked the fact, that the district court found Mr. Mathis's prior conviction for "interference with official acts" to be an ACCA predicate. *See* JA35. The error is immaterial, as the government must establish two additional predicate offenses, and none of Mr. Mathis's burglary convictions qualifies.

CONCLUSION

The judgment of the court of appeals should be reversed, Mr. Mathis's sentence vacated, and the case remanded.

Respectfully submitted.

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